

# Drug Testing in the Workplace: The Need for Quality Assurance Legislation

## I. INTRODUCTION

Olympic athletes do it.<sup>1</sup> The Navy does it.<sup>2</sup> Even President Reagan does it.<sup>3</sup> Drug testing is a reality in today's society. While scholars and civil libertarians debate constitutional<sup>4</sup> and privacy concerns,<sup>5</sup> thousands of urine samples are analyzed daily to detect the presence of marijuana, cocaine, heroin, amphetamines, barbiturates, and other mood-altering substances.<sup>6</sup> A positive test result may never be forgotten by an applicant denied a job, a college athlete forced to sit out a bowl game, or the family of an accident victim killed by an impaired worker's negligence.<sup>7</sup>

The proliferation of drugs in modern society has caused many employers to look to drug screening programs to accomplish certain goals. A primary concern is the desire to deter drug use in the workplace.<sup>8</sup> Employers hope that screening can help promote a safer work environment and help eliminate drug-related accidents or illness.<sup>9</sup> Employers may also wish to protect themselves from liability for an impaired worker's negligence.<sup>10</sup> Many employers desire to eliminate potential substance abusers from a particular pool of applicants before making a substantial investment in training and education. Pre-employment screening is one method used to accomplish that goal.<sup>11</sup>

On the other hand, many employees find something "fundamentally offensive" about submitting urine samples to an employer on demand.<sup>12</sup> One reason is that sometimes individuals are required to urinate under observation to safeguard against

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1. Catlin, Kammerer, Hatton, Sekera & Merdink, *Analytical Chemistry at the Games of the XXIIIrd Olympiad in Los Angeles, 1984*, 33 CLINICAL CHEM. 319 (1987).

2. Hanson, *Drug Abuse Testing Programs Gaining Acceptance in Workplace*, CHEM. & ENG'G NEWS, June 2, 1986, at 8.

3. Kaufman, *The Battle Over Drug Testing*, N.Y. Times, Oct. 19, 1986 (Magazine), at 52.

4. The fourth amendment to the U.S. Constitution prohibits the government from conducting unreasonable searches and seizures. While the fourth amendment does apply to drug testing programs for public employees, *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 176 (5th Cir. 1987), searches and seizures by private employers are not regulated by the fourth amendment. *See* 9A Lab. Rel. Rep. (BNA) 509:103 (Jan. 1987). An analysis of the constitutional issues of drug testing is beyond the scope of this Article.

5. Some state constitutions have specific right of privacy provisions that apply to private action, as well as governmental activities. *See, e.g., White v. Davis*, 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (discussing CAL. CONST. art. I, § 1 which provides: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.").

6. Rust, *The Legal Dilemma*, A.B.A. J., Nov. 1, 1986, at 51.

7. Stille, *Drug Testing: The Scene Is Set for a Dramatic Legal Collision Between the Rights of Employers and Workers*, NAT'L L.J., Apr. 7, 1986, at 1, col. 1; Neff, *Bosworth Faces the Music*, SPORTS ILLUS., Jan. 5, 1987, at 21; *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307 (Tex. 1983). Families of automobile accident victims brought this wrongful death action against an employer who sent an intoxicated employee home.

8. P. BENSINGER, *DRUGS IN THE WORKPLACE: EMPLOYERS' RIGHTS AND RESPONSIBILITIES* 1 (Wash. Legal Found. Monograph, 1984).

9. *Id.*

10. *Id.* at 7.

11. *Id.* at 16-20.

12. Cohen, *Labor Law's New Specialty: Drug Testing*, AM. LAWYER, June, 1986, at 10.

sample tampering.<sup>13</sup> Other applicants or employees may be reluctant to disclose to their employers that they have a medical condition such as epilepsy. Epilepsy is often controlled by prescription medication detectable in a urine drug screen.<sup>14</sup> Many individuals also have concerns about the accuracy of the testing process. A mistake at any step in the drug testing process could cause an innocent person to be labeled a drug user. Disastrous consequences may follow. The employee or applicant may not only lose employment, but also carry a lifelong stigma.

The first part of this Article discusses drug testing methodology and the reliability of the tests. The second part discusses currently available remedies for private sector employees who challenge the tests, and examines some challenges to reliability that have been made in the courts. Finally, legislation is recommended as a means of protecting workers from unregulated laboratories and inadequate testing procedures.

## II. TESTING

### A. Methodology

#### 1. Initial Testing

Much of the debate over drug testing focuses on the accuracy and reliability of the tests. Before one can appreciate the concerns over accuracy and reliability of results, it is important to receive an overview of drug testing methodology. Several methods are used as initial screens for a variety of drugs. The most common methods are thin layer chromatography (TLC), enzyme immunoassay (EIA), and radioimmunoassay (RIA).<sup>15</sup>

In the TLC method, a drop of chemically treated urine extract is put on a glass plate coated with a thin layer of silica gel. The plate is put into a solvent that moves up the plate by capillary action.<sup>16</sup> Drugs that are present in the urine extract are carried up the plate along with the solvent. Drugs are identified when a dye solution is sprayed onto the plate. The solution reacts with the drugs, causing colored spots to appear. A technologist matches the color and location of the spots on the plate with known standards. This reading of the plates requires a high degree of skill.<sup>17</sup> After a few minutes many of the spots fade away, leaving no permanent record of the test.<sup>18</sup> Many clinical reference laboratories use TLC for preliminary screening followed by

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13. *Conference Examines Accuracy of Drug Tests*, 1 INDIVIDUAL EMPLOYMENT RIGHTS (BNA) 4 (Dec. 9, 1986); *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986).

14. "Consideration should be given to the fact that sufficient discrimination still exists in our society and that individuals with these particular conditions may have been actively hiding them from their coworkers or employers." NATIONAL INSTITUTE ON DRUG ABUSE, URINE TESTING FOR DRUGS OF ABUSE 2 (NIDA Research Monograph No. 73, 1986); see M. ROTHSTEIN, MEDICAL SCREENING OF WORKERS, 204 (1984).

15. L. DOGOLOFF & R. ANGAROLA, URINE TESTING IN THE WORKPLACE 18 (1985).

16. Capillary action is the phenomenon in which the level of fluid inside an open tube of very small diameter is higher or lower than the level of the surrounding fluid as a direct result of interfacial or surface tension. 5 ENCYCLOPEDIA AMERICANA *Capillarity* 593 (1983).

17. L. DOGOLOFF & R. ANGAROLA, *supra* note 15, at 18.

18. *Id.*

a confirmation test conducted by another method.<sup>19</sup> Confirmation by another method of initially positive results can help eliminate the problem of false positives. The advantages of the TLC method include both its ability to distinguish between closely related compounds<sup>20</sup> and its relatively low cost.<sup>21</sup> Alternatively, the disadvantages are the high degree of expertise required to read results and the number of false positives that are generated.<sup>22</sup>

The immunoassays (EIA and RIA) are the most widely used methods for large scale drug screening programs.<sup>23</sup> These tests were specifically designed to detect the classes of drugs that are most commonly abused.<sup>24</sup> Both methods use antibodies to detect drugs.<sup>25</sup> If a specific drug is present in urine, the antibody to that drug or metabolite reacts with a test mixture (reagent) antigen.<sup>26</sup> These levels are usually measured in billionths of a gram (nanograms).<sup>27</sup> Even though a small quantity of the drug may be present, anything detected below the cutoff level will be reported as negative.<sup>28</sup> The cutoff level is the lowest amount of the drug which can be reliably detected by the procedure;<sup>29</sup> technical limitations of the procedure make a positive result uncertain below the cutoff level.<sup>30</sup> The methods have different cutoff levels, and there is variation in cutoff levels from laboratory to laboratory.<sup>31</sup>

The EIA method causes an absorbance in enzyme activity change which is measured by a device called a spectrophotometer.<sup>32</sup> The EIA method is often chosen for on-site testing away from a laboratory. For example, the Syva Company manufactures a desk-top sized test kit called EMIT which uses the EIA method.<sup>33</sup> The primary advantages of the EIA method are ease of testing and low cost. Nontechnical people can be trained to operate the equipment. The primary disadvantage of this method is that interfering substances sometimes cause inaccurate results.<sup>34</sup>

The RIA method gives off a low level of radiation which is measured by a gamma counter.<sup>35</sup> The RIA method must be used in a laboratory that is licensed to handle radioactive materials. The scientific community considers this method quite

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19. Hanson, *supra* note 2, at 9.

20. *Id.*

21. L. DOGOLOFF & R. ANGAROLA, *supra* note 15, at 18.

22. *Id.*

23. Hanson, *supra* note 2, at 9. *E.g.*, since 1985 the Department of Defense has used the RIA method for drug screening in the armed forces. Prior to June 1, 1985, both the EIA and RIA methods were used by the armed forces. Accuracy concerns appear to be the reason the EIA method was dropped. *In re Syva Co.*, Decision of the Comptroller General of the U.S., File B-218359.2 (Aug. 22, 1985).

24. The classes are amphetamines, barbiturates, benzodiazepines, cannabinoids (marijuana), cocaine, methaqualone, opiates (including heroin), and phencyclidine (PCP). L. DOGOLOFF & R. ANGAROLA, *supra* note 15, at 18-19.

25. *Id.* at 19.

26. For a layperson's explanation of the EIA technique, see *Higgs v. Wilson*, 616 F. Supp. 226, 228 (D.C. Ky. 1985).

27. L. DOGOLOFF & R. ANGAROLA, *supra* note 15, at 21-22.

28. *Id.* at 22.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Emit d.a.u. Amphetamine Assay*, 3C124-1, § 3 (Sept. 1984) (manufacturer's instruction booklet).

33. L. DOGOLOFF & R. ANGAROLA, *supra* note 15, at 19.

34. *Id.*

35. *Id.*

accurate. Its disadvantages consist of the need for a laboratory licensed to handle radioactive materials and its inability to test for some commonly abused drugs, such as methadone, PCP, librium, and valium.<sup>36</sup> Also, it is more expensive than the EIA test.<sup>37</sup>

## 2. Confirmation Testing

Toxicologists and the manufacturers of these tests recommend that all initially positive results be confirmed by another method to ensure accuracy.<sup>38</sup> The purpose of this two-tiered system is to eliminate false positives caused by cross-reactivity. Cross-reactivity occurs when compounds that are chemically similar to the drug or its metabolite cause a false reading.<sup>39</sup> For example, some over-the-counter cold pills and diet pills can produce a positive amphetamine result.<sup>40</sup>

There are several different ways to confirm initially positive results. The least reliable method is simply to repeat the original assay using the same method. While this method of confirmation may help to eliminate human error in the testing process, it does nothing to correct the problems of cross-reactivity or interfering compounds in the test itself.<sup>41</sup> At one point early in the Navy's testing program, the laboratory in Oakland, California had a huge backlog of samples to test.<sup>42</sup> In some cases the laboratory simply used a second RIA test to confirm the first positive RIA results.<sup>43</sup> Consequently, disciplinary actions taken against 3000 people on the basis of those test results were reversed.<sup>44</sup>

A more reliable method of confirmation is to confirm all initially positive results with the use of another screening method (for example, TLC followed by EIA or RIA).<sup>45</sup> The director of a forensic chemistry laboratory has noted, "[a]ny positive test result really needs to be confirmed by a method that is more specific, more reliable, and at least as sensitive as the initial screen."<sup>46</sup>

The most sophisticated state-of-the-art *confirmatory* method is called gas chromatography/mass spectrometry (GC/MS).<sup>47</sup> GC/MS breaks different compounds into electrically charged ion fragments, allowing for positive identification.<sup>48</sup> GC/MS is not a practical screening method for three main reasons. First, it is prohibitively more expensive than the other assays;<sup>49</sup> second, the method involves the use of sophisticated equipment; and third, it takes highly trained technologists to perform

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36. Hanson, *supra* note 2, at 9.

37. *Id.*

38. *Id.*

39. L. DOGOLOFF & R. ANGAROLA, *supra* note 15, at 20.

40. *Id.*

41. *Storms v. Coughlin*, 600 F. Supp. 1214, 1225 (S.D.N.Y. 1984).

42. Hanson, *supra* note 2, at 8.

43. *Id.*

44. *Id.*

45. *Id.* at 10.

46. *Id.* (quoting Randall C. Baselt, founder and director of the Chemical Toxicology Institute in Foster City, California).

47. L. DOGOLOFF & R. ANGAROLA, *supra* note 15, at 20.

48. *Id.*

49. *Id.*

the tests.<sup>50</sup> Even though GC/MS is not a practical screening method, the most accurate testing method available today is an initial screening test followed by GC/MS confirmation of all positive results.<sup>51</sup>

## B. Reliability

Regardless of which method or combination of methods is used to test for drugs, there will always be some incorrect results. These false results may be caused by a variety of factors.

### 1. Limitations of the Assays

Because the methodology of the immunoassays (EIA and RIA) is based on immune reactions, a certain degree of cross-reactivity occurs among various drug metabolites and structurally similar compounds of a particular drug.<sup>52</sup> For example, patients being treated for rheumatoid arthritis and osteoarthritis with ibuprofen<sup>53</sup> and fenoprofen may elicit a false positive for marijuana use.<sup>54</sup> This is due to interference between the compounds in these anti-inflammatory drugs and a popular Syva cannabinoid assay. Although the manufacturer of that particular assay reported in the summer of 1986 that it had reformulated the assay to eliminate this problem,<sup>55</sup> other false results can come from ingesting certain over-the-counter diet pills and cold medications that may give false amphetamine readings.<sup>56</sup>

Eating poppy seed cakes, which naturally contain some morphine, can cause an individual to have a positive urine test result for opiates.<sup>57</sup> The tests cannot distinguish between an ingestion of morphine from poppy seeds and an injection of heroin, since the result for either is a true positive for morphine.<sup>58</sup> Similarly, a drug analysis cannot differentiate between a person who is taking legally prescribed medication such as phenobarbital for epilepsy and a person who is abusing the drug without a prescription. Both will show positive results because the drug is present.

Drinking certain brands of herbal tea can also cause a person to have a positive urine test for cocaine metabolite.<sup>59</sup> These teas actually contain enough cocaine to cause intoxication. The results from eating poppy seeds or drinking herbal tea are not correctly classified as false positives because the compounds are actually present in the urine. They are instead true positives, even though the results may not be caused by drug abuse.<sup>60</sup>

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50. *Id.*

51. *Id.*

52. Hanson, *supra* note 2, at 10.

53. A popular over-the-counter brand of this drug is sold under the name Advil.

54. *Facts About Emit d.a.u. and Emit st Assays and Anti-Inflammatory Drugs*, SYVA NEWS REPORT 1 (Summer 1986) [hereinafter *Facts About Emit*]; Hanson, *supra* note 2, at 11.

55. *Facts About Emit*, *supra* note 54, at 1.

56. Hanson, *supra* note 2, at 10; L. DOGOLOFF & R. ANGAROLA, *supra* note 15, at 20.

57. *Answers to Your Questions*, SYVA NEWS REPORT 2 (Summer 1986); Hanson, *supra* note 2, at 11.

58. Hanson, *supra* note 2, at 11.

59. *Answers to Your Questions*, *supra* note 57, at 2.

60. *Id.*

## 2. Failure to Confirm

In addition to inaccurate results from the testing procedures themselves, other factors such as lack of proper confirmation can lead to erroneous results. For example, a recent study on the accuracy of EIA and RIA screening procedures for THC (the active ingredient in marijuana) was conducted at the Army Forensic Drugs Testing Laboratory at Fort Meade, Maryland.<sup>61</sup> Thousands of urine samples were field tested by nonlaboratory personnel using the EMIT (EIA) system.<sup>62</sup> Urine samples were also tested in the laboratory using the RIA method,<sup>63</sup> with positive samples confirmed by GC/MS.<sup>64</sup> Researchers found a 4% false positive rate and a 10% false negative rate for the EMIT samples.<sup>65</sup> The THC metabolite was detected by GC/MS in 99.7% of the positive RIA samples.<sup>66</sup> The researchers went on to conclude:

The identification of what appears to be false presumptive positive samples in the initial test supports the need to utilize a two-tier test system. Although the number of false presumptive positives is small, the consequences of a positive drug test result for the individual concerned are so severe that only the highest forensic standards are acceptable.<sup>67</sup>

The study concluded that an initial RIA test confirmed by GC/MS virtually eliminated the problem of false positives for marijuana.<sup>68</sup>

## 3. Specimen Collection

In order to ensure the validity and integrity of the urine samples that are tested, a variety of collection procedures exist to minimize opportunities to substitute or alter samples. To provide absolute assurance that the specimen belongs to a particular individual, direct observation must be used. Direct observation, however, raises privacy concerns that disturb the sensibilities of many individuals.<sup>69</sup> Recently, articles explaining how to foil test results have found their way into popular periodicals.<sup>70</sup> Consequently, in order to ensure that an authentic urine sample is submitted for testing, laboratories that perform the tests offer to their clients instructions in sample collection procedures. One laboratory recommends the following procedure:

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61. Abercrombie & Jewell, *Evaluation of EMIT and RIA High Volume Test Procedures for THC Metabolites in Urine Utilizing GC/MS Confirmation*, 10 J. OF ANALYTICAL TOXICOLOGY 178 (Sept./Oct. 1986).

62. *Id.*

63. *Id.*

64. *Id.* at 178-79.

65. *Id.* at 179.

66. *Id.*

67. *Id.* at 180.

68. *Id.*

69. See, e.g., *Union Plaza Hotel Culinary Workers Union, Local 226*, 88 Lab. Arb. (BNA) 528 (1986) (McKay, Arb.). The female employee in *Union Plaza* chose to be fired rather than completely disrobe and urinate in front of another person. The arbitrator reinstated the employee. See also Lehr & Middlebrooks, *Work-Place Privacy Issues and Employer Screening Policies*, 11 EMPLOYEE RELATIONS L.J. 407 (Winter 1985/86); Note, *Drug Testing in the Workplace: A Legislative Proposal to Protect Privacy*, 13 J. OF LEGIS. 269, 276-80 (1986).

70. E.g., *Foiling the Urine Police*, HARPER'S MAGAZINE 26 (Mar. 1987); Greene, *Business is Business to Peddler of Urine*, The Columbus Dispatch, Feb. 2, 1987, at 7A, col. 1. Additional methods of thwarting drug testing are listed in NATIONAL INSTITUTE ON DRUG ABUSE, *supra* note 14, at 22-23.

The employee/applicant should be required to empty his pockets and not be permitted to carry a coat, purse, etc., into the room where they [sic] will provide the specimen. An observer of the same sex should accompany the individual into the bathroom. In the case of females, the stall door should be left ajar. The individual's hands should remain in view at all times.<sup>71</sup>

If the need for absolute assurance is less, slightly less intrusive measures are used to deter tampering with the sample.

If the test is part of a physical exam, the employee/applicant should be asked to disrobe. Then [sic] he or she may then be examined by a physician or another member of the medical staff of the same sex as the employee. This will also determine that the employee does not have a substitute urine sample or materials that could be used to alter the specimen. The employee should then don a gown, be escorted to a dry room,<sup>72</sup> and asked to provide a specimen. As an alternative, the site or clinic may use a modified bathroom.<sup>73</sup>

The person collecting the sample must check to see if the bottle is warm, the color is a pale yellow, and the container is one-third to one-half full.<sup>74</sup> Individuals have been known to dilute the sample with warm water, substitute another person's "clean" urine for their own, and then run warm water over the container, or alter the specimen by adding bleach or other materials that might interfere with the results.<sup>75</sup>

Experts point out the need for forensic standards throughout the entire drug testing procedure, particularly where reputation, livelihood, incarceration, or the right to employment is an issue.<sup>76</sup> "Every drug screening case, whether it's performed on an employee or any person whose future is at stake, really needs to be considered a forensic case, and one should be handling the sample, conducting the test, and reporting the results as if one were going to court with it."<sup>77</sup>

#### 4. Human Error

The possibility of human error exists at every step in the testing process. Samples get mixed up or mislabeled. Many human beings handle the specimen as it goes through a chain of custody. One expert is concerned that "[t]he real room for error is not with the technology but with administrative error. A human being has to pick up the sample and put it in the machine. It may sound trivial but it's not. When the volume of work goes up, the error rate goes up."<sup>78</sup> Contamination, mishandling,

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71. Roche—A Subsidiary of Hoffman-La Roche Inc., *Examples of Collection Procedures for Insuring Validity and Integrity of Urine Samples for Drug Testing*, TECHNICAL REVIEW DIAGNOSTIC DIMENSIONS.

72. "A dry room is a room that has *nothing* in it that could be used to contaminate the urine, including water." *Id.*

73. "A modified bathroom is a bathroom that has blue colored bowl cleaner in the toilet tank (such as Ty-D-Bol). This prevents dipping water out of the bowl. In addition, the HOT water in the sink should be turned off (cold water may remain on). If dilution of the specimen is attempted, the bottle will appear blue-green in color and/or will not be warm." *Id.*

74. *Id.* at 2.

75. *Id.* at 1.

76. NATIONAL INSTITUTE ON DRUG ABUSE, *EMPLOYEE DRUG SCREENING 12* (DHHS Publication No. (ADM) 86-1442, 1986).

77. Hanson, *supra* note 2, at 12 (quoting Randall C. Baselt).

78. Stille, *supra* note 7, at 24, col. 1 (quoting Dr. Harold M. Bates, a chemist with Metpath Laboratories, Teterboro, N.J.).

and sabotage, especially where a drug testing program is conducted on the work site, can all cause erroneous results.<sup>79</sup>

Errors in reporting results can also occur. The samples may have been collected under optimum conditions; the chain of custody may have been properly preserved; a reputable laboratory may have conducted the assay and performed proper confirmation tests; yet a simple clerical error such as a transposition of numbers when reporting results could cause the transmission of incorrect results to the employer.

The following case illustrates the possibility of human error. A correction officer in New York City was dismissed because a mandatory drug screen indicated there was cocaine in his urine specimen.<sup>80</sup> The officer sought reinstatement, claiming that clinic personnel had directed him to place his specimen in an unmarked bottle, and that his bottle was left alongside other unmarked bottles containing the urine specimens of other persons being tested.<sup>81</sup> The court remanded the case for trial on the factual issue regarding the chain of custody of the sample.<sup>82</sup> The court observed that:

[I]f the clinic had included in its routine a simple procedure whereby a person tested observes his specimen being labelled, and initials a form confirming the accurate labelling, that would have resolved this proceeding and would also foreclose any future claims of mislabelling. We cannot simply ignore that there is always a normal routine in place for avoiding mistakes in the area of medicine and diagnostic tests, but *common experience continues to demonstrate that mistakes nevertheless occur, most often because of human error.*<sup>83</sup>

### III. REMEDIES

#### A. Theories of Liability

The common law provides only limited recourse for private sector employees who object to drug testing procedures. While the employment-at-will doctrine gives an employer the right to fire an employee for almost any reason, this doctrine is being steadily eroded by many courts.<sup>84</sup>

The law in all 50 states and the District of Columbia recognizes five main common law duties of employers for the protection of employees. Employers have a duty to:

- (1) provide a safe place to work;
- (2) provide safe appliances, tools, and equipment for the work;
- (3) give warnings of dangers of which the employee might reasonably be expected to remain in ignorance;
- (4) provide a sufficient number of suitable fellow employees; and

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79. Rothstein, *Screening Workers for Drugs: A Legal and Ethical Framework*, 11 *EMPLOYEE RELATIONS L.J.* 422, 427 (1986).

80. *Miciotta v. McMickens*, 118 A.D.2d 489, 490, 499 N.Y.S.2d 960, 961 (N.Y. App. Div. 1986).

81. *Id.* at 490, 499 N.Y.S.2d at 961.

82. *Id.* at 492, 499 N.Y.S.2d at 962.

83. *Id.* at 491, 499 N.Y.S.2d at 962 (emphasis added).

84. M. ROTHSTEIN, *supra* note 14, at 81-83. Many courts refuse to apply the employment-at-will doctrine where the dismissal is in bad faith or contrary to public policy.



(5) promulgate and enforce rules for the conduct of employees which would make the work safe.<sup>85</sup>

These duties may encourage employers to institute drug testing programs to assure a safe work environment. Consequently, as a condition of both pre-employment and continued employment, applicants and employees often are required to sign blanket waivers authorizing the company to use medical and personnel records as it deems necessary.<sup>86</sup> "Some critics argue that it is a cramped notion of 'consent' that deems an employee's decision to submit to drug testing on pain of losing his job 'consensual.'"<sup>87</sup>

For example, the alcohol and drug policy of the Atlantic Richfield Company requires pre-employment screening "to prevent hiring individuals who use illegal drugs or individuals whose use of legal drugs or alcohol indicates a potential for impaired or unsafe job performance."<sup>88</sup> The policy also requires employees to consent to a blood test, urinalysis, or other drug/alcohol screening if the individual is suspected of using or being under the influence of drugs or alcohol, or if workplace conditions justify testing.<sup>89</sup> "An employee's consent to a search is required as a condition of employment and the employee's refusal to consent may result in a disciplinary action, including termination, even for a first refusal."<sup>90</sup> Other employers require employees to submit to testing at unannounced times on a random basis.<sup>91</sup>

The potential for testing abuse remains regardless of which policy is used. An employee may feel singled out for testing because of conduct unrelated to drug use which merely angered the employer.<sup>92</sup> On the other hand, if a company tests all employees regardless of whether there is a suspicion of substance abuse, a dangerous jurisprudential principle might be established that runs counter to the American notion of presumption of innocence. Although not criminally accused, they are still being asked to prove they are not guilty of using drugs.<sup>93</sup>

Although there have been relatively few challenges to drug testing in the private sector, one attorney has predicted that "as employers start hitting on socioeconomic groups that have the financial wherewithal to afford litigation and see it to the end they will be challenged more often in court."<sup>94</sup>

One person who successfully challenged a drug test was Joe W. Wherry. This employee brought suit against his employer for defamation in *Houston Belt and*

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85. *Id.* at 83-84.

86. Rothstein, *supra* note 79, at 427-28.

87. Kaufman, *supra* note 3, at 66.

88. Loomis, *Corporate Approaches—Maintaining Control of Drugs & Alcohol in the Workplace*, in *AIDS & DRUG ABUSE IN THE WORKPLACE* 129 (1986).

89. *Id.* at 131.

90. *Id.*

91. *Id.* at 178.

92. NATIONAL INSTITUTE ON DRUG ABUSE, *supra* note 14, at 11. See also Englade, *Who's Hired and Who's Fired*, *STUDENT LAWYER* 25 (Apr. 1986); *Storms v. Coughlin*, 600 F. Supp. 1214, 1223 ("Prisoners may be targeted for testing simply to harass them."); Kaufman, *supra* note 3, at 66.

93. Rust, *supra* note 6, at 54.

94. *Id.*

*Terminal Railway v. Wherry*.<sup>95</sup> The worker had fainted on the job.<sup>96</sup> The chief surgeon for his employer ordered two tests to find out why he had fainted: one test for diabetes, the other a drug screen.<sup>97</sup> The initial drug screen reported a trace of methadone in the employee's urine.<sup>98</sup> The company first suspended and then discharged the employee, later circulating a statement that he had been fired for using methadone.<sup>99</sup> Further testing arranged by the employee showed that there was a compound in his urine which was similar to methadone, but it was neither methadone nor any of the other commonly abused drugs.<sup>100</sup> The employee first sought help from the Veterans' Administration on the ground that he was discharged without cause.<sup>101</sup> He then appealed his discharge under the Railway Labor Act.<sup>102</sup> His dismissal was affirmed by Public Law Board No. 1259, an arm of the National Railroad Adjustment Board.<sup>103</sup>

The employee subsequently brought a defamation action against his employer for making false statements accusing him of using drugs.<sup>104</sup> The employee gained both compensatory and punitive damages against the railroad, the award being upheld on appeal.<sup>105</sup> A petition for rehearing was denied in March 1977, over four and one-half years after he was initially fired.<sup>106</sup> The employee had to fight a four-year battle to clear his name and erase the stigma of being labeled a drug user. It seems clear in retrospect that a proper confirmation of the initially positive result by GC/MS could have prevented both the damage to this individual's reputation and the loss of his source of livelihood.

An action for defamation requires the publication of false statements that damage the plaintiff.<sup>107</sup> Defenses include absolute privilege, qualified privilege, and truth.<sup>108</sup> The element of publication and the defense of privilege render this an impractical cause of action for most potential plaintiffs, because in many states it is permissible to warn a present or prospective employer of misconduct of an employee.<sup>109</sup> This places a burden on the employee to show that statements were made with a reckless disregard for the truth or with actual malice.<sup>110</sup>

In addition to a cause of action against an employer for defamation, other potential causes of action are available against employers who mishandle testing. These include invasion of privacy, negligence, wrongful discharge, and intentional

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95. 548 S.W.2d 743 (Tex. Civ. App. 1976).

96. *Id.* at 746.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 747.

102. *Id.*

103. *Id.*

104. *Id.* at 745.

105. The employee received \$150,000 in compensatory damages and \$50,000 in exemplary damages. *Id.* at 746, 753.

106. *Id.* at 743.

107. PROSSER & KEETON, *THE LAW OF TORTS* 797 (5th ed. 1984).

108. *Id.* at 815-42.

109. *Id.* at 827 n.27.

110. L. DOGOLOFF & R. ANGAROLA, *supra* note 15, at 15.

infliction of emotional distress. The lack of drug testing case law in the private sector may be an indication that these theories are ineffective methods of redress for an aggrieved individual.

The tort of invasion of privacy does not require publication to activate the cause of action.<sup>111</sup> However, it seems unlikely that a plaintiff could prevail in the face of the employer's common law defense of consent.<sup>112</sup> The employer can argue that the employee is under no compulsion to be tested; the employee has the option to refuse the test even if it means losing one's job.<sup>113</sup>

Negligent dissemination of medical records might be even harder to prove, because the plaintiff must overcome the defense that there is no physician-patient relationship between an applicant or employee and a company doctor.<sup>114</sup> In the case of *Finklea v. Tonsey*, a manual laborer for a company that used fast-moving presses took a drug test which disclosed the presence of Darvon in his urine.<sup>115</sup> The medical director asked the employee to procure a note from his doctor stating what kind of medication he was taking.<sup>116</sup> The employee had been treated for physical and emotional problems, and several months prior to the time the drug screen was conducted had been prescribed a variety of drugs, including Valium, Elavil, and Darvoset.<sup>117</sup> The medical director telephoned the employee's clinic, where an unknown source stated the employee "has been receiving various drugs, Valium, Melaril, Elavil, Biphethamines, Darvoset, and some other tranquilizers."<sup>118</sup> There was also conflicting testimony as to whether the employee was taking Thorazine.<sup>119</sup> The medical director recommended that because of the medications the employee was taking it would be unsafe to continue his employment.<sup>120</sup> The employee was discharged.<sup>121</sup>

The employee alleged that the medical director acted negligently in speaking to an unknown person at the clinic who purportedly provided the facts relating to the employee's medical history.<sup>122</sup> The employee also argued that the medical director should have inquired into whether the employee in fact suffered any side-effects such as dizziness or lack of coordination associated with the drugs Elavil and Valium.<sup>123</sup> The employee also argued that the note he gave to the medical director listed medication he was taking during a period when he was laid off from his job, not the subsequent period of time when the drug test was conducted.<sup>124</sup>

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111. LEHR & MIDDLEBROOKS, *supra* note 69, at 409-11.

112. *Id.* at 411. See *supra* notes 86-91 and accompanying text for a discussion of consent.

113. Rothstein, *supra* note 79, at 433.

114. M. ROTHSTEIN, *supra* note 14, at 5-6.

115. 317 Pa. Super. 553, 556, 464 A.2d 460, 462 (1983).

116. *Id.* at 556, 464 A.2d at 462.

117. *Id.*

118. *Id.* at 557, 464 A.2d at 462.

119. *Id.* at 557-58, 464 A.2d at 462-63.

120. *Id.* at 558, 464 A.2d at 463.

121. *Id.*

122. *Id.* at 557, 464 A.2d at 462-63.

123. *Id.* at 560, 464 A.2d at 464.

124. *Id.* at 559, 464 A.2d at 463.

The appellate court affirmed the trial court's finding that the medical director was not negligent.<sup>125</sup> First, the court noted that the employee had offered no evidence suggesting that the medical director should have known the doctor's note was incorrect.<sup>126</sup> Second, the company policy stated that no one could work in the press area who used the kinds of medication the employee had been taking.<sup>127</sup> The court indicated that this blanket policy outweighed testimony that the employee did not suffer any adverse side-effects from medication and the argument that an individualized exception to the policy should apply.<sup>128</sup> Finally, even if the unknown source at the clinic had been wrong, and the note which indicated he was taking prescribed medication was erroneous, the medical director could not be liable for negligence since the note was provided by the employee himself, and the employee had done nothing to correct the erroneous impression that it provided up-to-date information.<sup>129</sup> The concurring judge noted that the court had not attempted to define the scope of the duty a company physician owes to an employee.<sup>130</sup> Nor had the court held that a company physician's duty is "co-extensive with that which is owed where the doctor-patient relationship does in fact exist."<sup>131</sup>

This case illustrates the difficulties a private sector employee faces when attempting to challenge the conduct of his employer. Rather than attack the findings of the drug test itself, this employee challenged the conduct of the company's medical director. When the initial drug screen showed a positive result, the employee may have felt compelled to justify the result by disclosing that he was taking prescription medicine, not illegal drugs. He may have hoped that if he revealed his treatment for physical and emotional problems the company would not fire him. He may have thought that since he was taking prescribed medication he would not be disciplined or discharged for illicit drug abuse. However, the company's medical director apparently was under no duty to warn the employee that the information provided to the company doctor would be used against him.

An employee who is discharged for violating a substance abuse policy could allege wrongful discharge on either the theory that the employer breached an implied covenant of good faith and fair dealing, or that there was a failure to follow an implied contract or personnel policy.<sup>132</sup> However, where the employee has a policy difference with the employer, even if based on a concern for ethics or public safety, prior cases do not guarantee protection to the employee.<sup>133</sup> Many of these wrongful discharge cases are based on a public policy exception to the employment-at-will doctrine.<sup>134</sup> Given the recent spate of publicity about the dangers of drug use, an

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125. *Id.* at 555-56, 464 A.2d at 461-62.

126. *Id.* at 559, 464 A.2d at 463.

127. *Id.* at 560, 464 A.2d at 464.

128. *Id.* at 560-61, 464 A.2d at 464.

129. *Id.* at 560, 464 A.2d at 464.

130. *Id.* at 561, 464 A.2d at 464.

131. *Id.*

132. Mills, *An Employer's Approach to the AIDS Problem and Employee Responses to Drug and Alcohol Abuse in the Workplace*, in *AIDS & DRUG ABUSE IN THE WORKPLACE* 67 (1986).

133. PROSSER & KEETON, *supra* note 107, at 1028.

134. Rothstein, *supra* note 79, at 433.

employee would find it exceedingly difficult to prove that a dismissal for drug use violated a public policy.<sup>135</sup>

Finally, an employer who conducts testing in a careless and undignified manner might be sued for intentional infliction of emotional distress. The requirements are difficult to satisfy because the conduct must be outrageous, exceeding all bounds usually tolerated by decent society, and cause serious mental distress.<sup>136</sup> In a suit pending in California, the plaintiff is challenging an employer's right to randomly test an employee in the absence of both reasonable suspicion of drug use and impairment of her work.<sup>137</sup> In response to her employer's request, the plaintiff refused to be tested and was dismissed.<sup>138</sup> According to her attorney, one reason for her unwillingness to undergo testing was that she was three months pregnant and had not told anyone at work about her pregnancy due to a fear that her condition might adversely affect her career.<sup>139</sup> Her claims include wrongful termination in violation of public policy, retaliatory discharge for exercise of constitutional rights, invasion of privacy, and intentional infliction of emotional distress.<sup>140</sup>

Another potentially liable party might be the laboratory that performed a drug analysis and failed to properly confirm an initially positive result. An employee/applicant who can prove the laboratory did not properly follow the manufacturer's instructions in performing the test may recover under a theory of negligent testing.<sup>141</sup>

Not only the employee but also the employer may attack the credibility of laboratory results and procedures. An employer has recently filed suit against a major drug testing laboratory after the employer discovered that it had received legally indefensible test results from the laboratory.<sup>142</sup> The employer fired a clerk based on a positive marijuana result.<sup>143</sup> The clerk filed suit against the employer, and the suit was settled for a cash award and reinstatement. The employer maintains that laboratory personnel claimed that the initial positive result had been confirmed by a second, more reliable testing procedure when, in fact, no confirmation had been made. The employer is suing under theories of negligence, fraud, and deceit in testing.<sup>144</sup>

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135. See M. ROTHSTEIN, *supra* note 14, at 81-83.

136. PROSSER & KEETON, *supra* note 107, at 60.

137. Luck v. Southern Pacific Trans. Co., No. C84-3-230 (Cal. Super. Ct., S.F. Cty., filed Aug. 5, 1985) (cited in Stille, *supra* note 7, at 22).

138. Stille, *supra* note 7, at 22; Kaufman, *supra* note 3, at 69.

139. Stille, *supra* note 7, at 22.

140. Schachter & Geidt, *Controlling Workers' Substance Abuse*, NAT'L L.J., Nov. 11, 1985, at 20, col. 1.

141. L. DOGOLOFF & R. ANGAROLA, *supra* note 15, at 15.

142. San Diego Gas & Elec. Co. v. National Health Laboratories, No. 4380 (San Diego Sup. Ct. filed Apr. 23, 1987).

143. The complaint is summarized in Industrial Relations, Inc., *Employee Relations Advisor* 11 (L. Souvé ed. Apr/May 1987).

144. The employee is seeking recovery of the settlement amount, attorneys' fees, and punitive damages of \$500,000.

### B. *The Prison Cases*

Few reported cases challenging the validity of drug testing have come from the private sector, but several prison cases illustrate how federal judges have viewed the accuracy and reliability problem.

In *Jenson v. Lick*,<sup>145</sup> an inmate at the North Dakota state penitentiary challenged the reliability of the EMIT drug screen manufactured by the Syva Company.<sup>146</sup> The plaintiff claimed the EMIT urinalysis test was inaccurate because it invariably returns a small percentage of false-positive tests.<sup>147</sup> The court responded by noting that the Center for Disease Control in Atlanta, Georgia had tested the reliability of the EMIT procedure and found it to be 97 to 99% accurate.<sup>148</sup> The court also noted that the manufacturers of the test claim "*testers can act with a 95% confidence in the accuracy of the test result.*"<sup>149</sup> The court concluded that the 95% figure was "tantamount to almost complete certainty."<sup>150</sup> Consequently, the court held that whether the proper standard of proof in the prison urinalysis program was "beyond a reasonable doubt" or "more likely so than not so," the 95% level of reliability was adequate to support a decision for administrative punishment.<sup>151</sup> The court did not think that confirmation of a single positive EMIT result was necessarily required by the program, but indicated that an "inmate claiming the test is false can as part of his defense contest the specific result through his representative by requiring a confirmatory test. . . ."<sup>152</sup> Thus, in this prison context, the court is willing to permit individuals to be disciplined on the basis of a single, unconfirmed EMIT drug test.

Another opportunity to examine the reliability of the EMIT drug screen arose in New York. Inmates of the New York state prisons sought an injunction preventing prison authorities from taking disciplinary action against inmates based on unconfirmed urinalysis results.<sup>153</sup> A federal magistrate granted a preliminary injunction enjoining the prison authorities from taking future disciplinary actions against inmates based solely on an unconfirmed positive EMIT test, and ordered the prison to begin confirming all positive EMIT results by another reliable method before using the results as the sole basis of disciplinary action.<sup>154</sup> However, the district court held that the prisoners had not met their burden of demonstrating entitlement to injunctive relief and denied their motion until a trial on the merits could be held.<sup>155</sup> The court listened to the testimony of several expert witnesses on the reliability of the EMIT procedure.<sup>156</sup> The court summarized the expert's testimony and found error rates from a low of 2.3%

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145. 589 F. Supp. 35 (D.N.D. 1984).

146. *Id.* at 36.

147. *Id.*

148. *Id.* at 38.

149. *Id.* (emphasis in original).

150. *Id.* at 39 (emphasis in original).

151. *Id.*

152. *Id.*

153. *Peranzo v. Coughlin*, 608 F. Supp. 1504, 1506 (S.D.N.Y. 1985).

154. *Id.* at 1507.

155. *Id.* at 1511-12, 1515.

156. *Id.* at 1509-12. The New York prison program repeated initially positive EMIT results by performing another EMIT test. *Id.* at 1510.

to a high of 25% in the EMIT procedure.<sup>157</sup> However, the court had narrowed the scope of its inquiry by saying: "The question, 'How reliable is the test?' is one for scientists to resolve; the question, 'Is the test sufficiently reliable such that its use as the basis for imposing disciplinary sanctions against prisoners does not offend constitutional standards?' is a legal matter to which different standards apply."<sup>158</sup> Therefore, although the court held that additional confirmatory testing was not required as a matter of due process for prisoners, the court recognized that the additional safeguards of outside confirmatory testing by TLC would serve a worthwhile purpose.<sup>159</sup>

In contrast to the preceding cases, two other federal courts have examined the reliability of the EMIT drug screen in the prison setting and have required additional evidence to confirm the presence of drugs. In *Wykoff v. Resig*,<sup>160</sup> a prisoner challenged the validity of using the TLC method to confirm a positive EMIT drug screen for marijuana.<sup>161</sup> The court specifically found that "the TLC method of confirming an EMIT test is sufficient. Even though Gas Chromatography or Gas Chromatography/Mass Spectroscopy might be the best methods with which to confirm an EMIT test, plaintiff has not shown that the TLC method of confirming positive EMIT results is inadequate or unreliable."<sup>162</sup> Despite this finding, the court went on to prospectively require that all positive EMIT results in the prison program be confirmed by a second EMIT test or its equivalent.<sup>163</sup> Although stopping short of requiring an alternate method of confirmation, the court did not think a single, unconfirmed EMIT test provided a reliable basis for disciplinary action.<sup>164</sup>

Yet another challenge to the EMIT drug screen arose from inmates in the Kentucky state prisons.<sup>165</sup> In this case, all the experts testified in favor of the need for confirmation testing.<sup>166</sup> The prison's own expert first testified that the EMIT test was reliable without a backup.<sup>167</sup> He then admitted that at an earlier hearing he had stated that the EMIT test alone was unreliable and any single test should be backed up with a second test.<sup>168</sup> However, he later testified that he did not believe confirmation was necessary if the individual was either in prison or on parole.<sup>169</sup> He did not explain his rationale for this double standard. The court looked to state decisions in Massachusetts and Vermont which held that "the chance of false positives in unconfirmed EMIT test results and the concomitant loss of liberty violates minimum fundamental fairness and the prisoners' due process rights."<sup>170</sup> The district court found the evidence before them to be similar to the state case and granted injunctive relief to the

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157. *Id.* at 1511.

158. *Id.* at 1507.

159. *Id.* at 1514.

160. 613 F. Supp. 1504 (N.D. Ind. 1985).

161. *Id.* at 1512.

162. *Id.*

163. *Id.*

164. *See id.* at 1512.

165. *Higgs v. Wilson*, 616 F. Supp. 226 (W.D. Ky. 1985).

166. *Id.* at 229.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 230.

prisoners.<sup>171</sup> However, the court stopped short of requiring confirmation of a positive EMIT drug screen by another method.<sup>172</sup> Instead, the court required the prison to "confirm the test with other evidence—either another alternative method test, testimony that the accused was seen with contraband[,] . . . evidence that drugs were found in his cell, or other . . . circumstantial evidence. . . ."<sup>173</sup>

Thus, an examination of the prison cases demonstrates that the reliability issue is far from settled. Prisoners have had limited success in challenging the constitutionality of some drug testing programs, and in some cases have prevailed when the lack of proper confirmation procedures violated their due process rights. The prison cases point out that our society grants some prisoners greater protection than is due job applicants or employees. A job applicant might be denied a job on the basis of a single unconfirmed drug test, but a prisoner in Kentucky or Indiana may not be disciplined on the same basis. Our legal system does not account for the fact that the same dangers of testing exist whether the tests are conducted by the government or by a private employer. The private sector workforce is "virtually without remedy due to the difficulty of establishing an actionable tort, the absence of 'state action,' and a lack of legislation in this area."<sup>174</sup>

#### IV. RECOMMENDATIONS

##### A. *The Need for Legislation*

The remedies currently available to private sector employees or applicants wronged by either their employers or the laboratory that performed the test are limited and inadequate. Scant recourse is available to an applicant screened out before the hiring process is complete.<sup>175</sup> While terminated employees might sue either their employers for wrongful discharge, intentional infliction of emotional distress, invasion of privacy, or defamation, or the laboratory for negligent testing, these avenues are costly, time consuming, and difficult to prove. Even reinstatement or a damage award might fail to erase the stigma that charges of drug abuse can cause.<sup>176</sup>

As drug testing becomes more commonplace in today's workplace, even a tiny margin of error in the testing procedure has the potential to harm increasingly greater numbers of people.<sup>177</sup> Rather than requiring the victims of erroneous testing to use the

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171. *Id.* at 232.

172. *Id.*

173. *Id.*

174. Note, *supra* note 69, at 287.

175. "[M]onumental changes in the at-will doctrine will be required before anything even approaching a good-cause standard can be applied to employer hiring decisions . . . ." M. ROTHSTEIN, *supra* note 14, at 83. The Atlantic Richfield Company allows job applicants who test positive for marijuana to receive conditional employment based on a six-month period of negative test results. Loomis, *supra* note 88, at 134.

176. Many arbitrators apply a stricter standard of proof in drug cases than in alcohol cases. The rationale for this is that "matters carrying the 'stigma' of criminal conduct or of general social disapproval must be applied with an especially high degree of fairness supported by strong proof. Arbitrators have also noted that an employee discharged for such an offense may have greater difficulty finding another job, thus making it imperative that the employer be correct in its accusations." Geidt, *Drug and Alcohol Abuse in the Work Place: Balancing Employer and Employee Rights*, 11 EMPLOYEE RELATIONS L.J. 181, 193-94 (1986).

177. A recent study of fifty drug testing laboratories by the National Institute on Drug Abuse reveals that twenty



courts in a rear-guard action to vindicate their rights, legislation is needed to regulate drug testing both as a condition of initial employment and as a condition of continuing employment.<sup>178</sup>

On September 15, 1986, President Reagan issued an executive order mandating drug testing for federal workers.<sup>179</sup> The executive order states that:

Drug testing programs shall contain procedures for timely submission of requests for retention of records and specimens; procedures for retesting; and procedures, consistent with applicable law, to protect the confidentiality of test results and related medical and rehabilitation records. . . .<sup>180</sup> Preliminary test results may not be used in an administrative proceeding unless they are confirmed by a second analysis of the same sample or unless the employee confirms the accuracy of the initial test by admitting the use of illegal drugs.<sup>181</sup>

As a result of Executive Order 12,564, the Department of Health and Human Services proposed specific drug testing guidelines for federal agencies.<sup>182</sup> These guidelines attempt to safeguard the testing process and ensure that testing is performed by competent laboratories. The guidelines might also serve as a model for state legislatures contemplating regulation of drug testing laboratories. Despite these proposed guidelines, however, slipshod and disreputable laboratories continue to operate, sometimes with disastrous consequences.

One recent debacle involved the federal laboratory that conducted drug tests following the worst railroad accident in Amtrak history. Investigation revealed that the laboratory fabricated the blood tests of the engineer involved in the train crash.<sup>183</sup> Neither the laboratory supervisor, nor other laboratory personnel, knew how to correctly operate their gas chromatograph/mass spectrometer. Laboratory personnel did not even know how to extract a test sample from blood plasma. The laboratory workers used improperly calibrated instruments, lost the computer data backing their findings, and squandered the engineer's entire blood sample.<sup>184</sup> Consequently, retesting by a competent laboratory could not be done. This incident merely underscores the need to regulate both the drug testing facilities and the laboratory personnel.

Since the issuance of the executive order, and the sudden death of college basketball star Len Bias, there has been an upsurge of interest and support for compulsory drug testing, particularly in pre-election speeches by political figures.<sup>185</sup> Consequently, it is now imperative that state legislatures pass protective drug testing legislation. Nothing less can ensure adherence to proper standards of care by those

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percent of the laboratories erroneously reported the presence of drugs in urine specimens. False negatives were reported in eleven percent of the samples. 1 *Emp Testing*: Biweekly Rep. (Univ. Pub. of Amer.) 36 (May 15, 1987).

178. See Note, *supra* note 69, at 287.

179. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

180. *Id.* at § 4.[c].

181. *Id.* at § 5.[e].

182. Fed. Reg. 30,637 (1987) (proposed Aug. 4, 1987).

183. Bogdanich, *Federal Lab Studying Train, Airline Crashes Fabricated Its Findings*, Wall Street J., July 31, 1987, at 12.

184. *Id.*

185. Curran, *Compulsory Drug Testing: The Legal Barriers*, 316 NEW ENG. J. MED. 318-19 (Feb. 5, 1987).

performing the tests. Nothing less can protect the rights of millions of workers who may be involved in a testing program in the near future.

A number of states have passed or are considering such legislation.<sup>186</sup> But for the most part, private laboratories conducting drug detection testing in the United States are generally not compelled to comply with specific guidelines to ensure accurate results.<sup>187</sup> The laboratories conducting these programs need to meet standards of quality control, chain of custody, technical expertise, and documented proficiency over time in urinalysis testing.<sup>188</sup> Otherwise, innocent workers risk being labeled drug users on the basis of inaccurate results.

### B. Legislative Guidelines

Legislation should deal with the problems of specimen integrity and accuracy of test results, specifically as they apply to both pre-employment and on-the-job screening. Employers should be required to have samples tested by state-licensed laboratories and to maintain adequate quality assurance programs.<sup>189</sup> Quality assurance programs are documented procedures which the laboratory follows to ensure reliability by controlling the way specimens are handled, and how instruments are checked to be sure they are functioning properly. The programs also involve analyzing standard samples and blank samples along with unknown samples to see if the total laboratory system is producing the expected results.<sup>190</sup> Currently, in most states, "[a]nybody can buy a portable testing unit and hang out a shingle claiming to be operating a drug testing lab."<sup>191</sup> It costs money to belong to these quality assurance programs, and there is a danger that some laboratories may not want to know how good or bad their work might be.<sup>192</sup> Also, a company may decide to begin a drug testing program and shop around for a laboratory that will do the work at a rock-bottom price.<sup>193</sup> Legislation requiring that all testing be performed by accredited laboratories can help eliminate the fly-by-night instant toxicologists; such a step would also allow reputable laboratories to compete on an equal basis.

All initially positive drug screens should require confirmation by an alternate method prior to the commencement of any disciplinary actions, and gas chromatography/mass spectrometry (GC/MS) confirmation procedures should be

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186. Connecticut requires an initial positive result to be confirmed by a second urinalysis, and that positive result must be confirmed by gas chromatography/mass spectrometry or an equally reliable method. The new law also prohibits direct observation of urination. 1987 Conn. Legis. Serv. 500-02 (West). Iowa requires that an initially positive result be confirmed by a second test using an alternative method of analysis. 1987 Iowa Legis. Serv. 132-36 (West). Minnesota has an extensive statute that regulates laboratories, testing procedures, reporting, sample retention, chain-of-custody, and confidentiality. 1987 Minn. Sess. Law Serv. 768-86 (West). New Jersey has recently enacted the Pre-employment and Employment Drug Testing Standards Act which was unavailable as of this writing. Utah has a vaguely worded statute that does, however, require confirmation by gas chromatography or gas chromatography/mass spectrometry before the result can be used as the basis of disciplinary or rehabilitative action. UTAH CODE ANN. §§ 34-38-1—38-15 (Supp. 1987). California SB1611 is pending. For recent developments in this rapidly changing area, see 9A LAB. REL. REP. (BNA) 540.

187. NATIONAL INSTITUTE ON DRUG ABUSE, *supra* note 14, at 3.

188. *Id.*

189. These programs regulate internal and external quality control procedures. Hanson, *supra* note 2, at 12.

190. NATIONAL INSTITUTE ON DRUG ABUSE, *supra* note 14, at 16-17.

191. Hanson, *supra* note 2, at 12.

192. *Id.*

193. Stille, *supra* note 7, at 24.

required for all positive samples where the employee faces termination. This assures that the burden of proving drug use is on the employer. Arbitrators have recognized the need for placing the burden of proof on the employer in cases involving disciplinary action. One arbitrator articulated the reasons for this in the following manner:

(1) [s]ince discharge is the most severe penalty that an employer can impose, being the equivalent of "economic capital punishment," he must bear the burden of justifying such a serious move; (2) since the reasons for the employer's disciplinary action are peculiarly within his own knowledge, he must carry the burden of demonstrating their adequacy; (3) it is inconsistent with the American tradition that a person should be considered a wrongdoer until proof establishes his guilt; (4) the imposition of the burden of proof on the employer is justifiable as merely an extension of scientific management to industrial relations; (5) the existence of just cause for discharge is in the nature of an affirmative defense; therefore the burden rests on the party asserting it; and (6) a just cause provision in the agreement in view of circumstances peculiar to industrial relations requires the company, when challenged, to retrace the disciplinary process and convince an impartial third person that the facts acted upon warranted the action taken.<sup>194</sup>

While the employer should bear the cost of one repeat test and GC/MS confirmation of disputed positive results, further testing of a disputed result could be at the employee's expense. Requiring employees to bear the cost of additional confirmatory testing would discourage frivolous disputes over test results.

The laboratories should be required to provide the employers with collection bottles, seals, shipping containers, and chain-of-custody forms to be filled out at the collection point.<sup>195</sup> The employer and testing laboratory must comply with proper chain-of-custody procedures and have the capacity to freeze positive samples for up to six months to allow time for retesting if results are challenged.<sup>196</sup> Following proper chain-of-custody and specimen handling procedures would not only assist the employer in any subsequent litigation, but it would also help to ensure the accuracy and integrity of test results.

## V. CONCLUSION

In order to demonstrate the need for legislation designed to decrease erroneous drug test results, this Article has examined current drug testing methodology and the debate over the reliability of the tests. Although the reliability issue is still far from settled, challenges have already begun to reach the courts since drug testing is becoming an increasingly common occurrence in contemporary society. Both employees and employers can benefit from legislation designed to limit testing abuse, rather than wait for further ad hoc development in the courts.

*Marianne Neal*

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194. BENSINGER, *supra* note 8, at 9 (quoting Hussman Refrigerator Co., 68 Lab. Arb. (BNA) 565, 569 (1977)).

195. NATIONAL INSTITUTE ON DRUG ABUSE, *supra* note 14, at 16, 24-25.

196. *Id.* at 15.

